In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 154

IRA P. DOCTOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision of the Court of Claims (Pet. App. A) holding that his action to recover military pay was barred by the six-year statute of limitations (28 U.S.C. 2501; Pet. App. B). Petitioner's pay had been forfeited under an eleven-year-old court-martial conviction, which was affirmed by the Court of Military Appeals nine years before the present action was commenced. The decision below was plainly correct and does not warrant review by this Court.

On June 2, 1954, petitioner was convicted by a general court-martial of having given false answers during an official investigation and was sentenced to discharge and forfeiture of pay and allowances (Pet.

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2-3). The conviction and forfeiture were affirmed by the court-martial convening authority, an Army Board of Review and, finally, on June 8, 1956, by the Court of Military Appeals (Pet. 3). *United States* v. *Doctor*, 7 USCMA 126, 21 CMR 252. Nearly nine years later, on May 10, 1965, petitioner sought further review of the forfeiture by means of the present suit for back pay in the Court of Claims. It is clear that, as the court below held, the suit is barred by the six-year statute of limitations.

Seeking to avoid the bar of the statute, petitioner notes that, on August 15, 1962, he moved for reconsideration in the Court of Military Appeals, his motion being denied on October 25, 1962 (Pet. 9–10).[1] But this motion was itself filed after the six-year limitations period had run. Thus, the motion could not possibly have tolled the running of the statute. Cf. *Friedman* v. *United States*, 310 F. 2d 381, 390 (Ct. Cl.). And the mere refusal to grant the motion plainly was insufficient to begin a new six-year limitations period. Cf. *Robinson* v. *United States*, 163 Ct. Cl. 235; *Friedman* v. *United States, supra* at 400–401.

Petitioner's reliance (Pet. 10–12) on *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, is misplaced. In that suit under the Federal Employers' Liability Act, this Court held that an employer whose agents had erroneously told the plaintiff that he had seven years in which to bring suit was not entitled to assert the three-year statute of limitations as a defense. No

[1] This motion was apparently based upon the same allegations of "fraud and concealment" relied on in the present petition (Pet. 3–8; see p. 3, *infra*).

such misrepresentation is alleged here. Moreover, nothing in *Glus*, an action between private parties, altered in any way the rule that the statute of limitations on suits against the United States is jurisdictional and may not be waived, expressly or otherwise, by government agents. See, *e.g.*, *Munro* v. *United States*, 303 U.S. 36, 41; *Automobile Club* v. *Commissioner*, 353 U.S. 180, 187; *Pittman* v. *United States*, 341 F. 2d 739 (C.A. 9), certiorari denied, 382 U.S. 941; cf. *Soriano* v. *United States*, 352 U.S. 270.

Even if, as petitioner contends (Pet. 14), there is an "exception" to the statute of limitations for "fraud and concealment,"[2] petitioner's allegations, fairly considered, show nothing that the government did or failed to do which could be said to constitute fraud or which reasonably could have caused petitioner to delay instituting a timely action in the court below. Petitioner attacks the "concealment," at the time of his trial in 1954, of statements by his assistant defense counsel contained in an official investigation report. But petitioner knew of the existence of the report at the time of his trial and was aware that parts of it were withheld because of their privileged nature. See Manual for Courts-Martial, § 151b(3), 16 Fed. Reg. 1303, 1385. Moreover, the contents of the

[2] In *Mulholland* v. *United States*, 165 Ct. Cl. 231, the Court of Claims explicitly stated that, if fraud or concealment is shown, the running of the statute of limitations in favor of the United States will be tolled until such time as the fraud is discovered by the plaintiff. The validity of this ruling is not here in issue, and the court's refusal to accept petitioner's contention that the *Mulholland* principle applied in the circumstances of this case obviously presents no general issue of importance warranting review by this Court.

report, including the remarks of assistant defense counsel, were made known to petitioner in 1959—within six years of his conviction and its affirmance by the Court of Military Appeals. Thus, well within the statutory period, petitioner had available all the information upon which he based this action, which he finally filed in 1965.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1966.

U. S. GOVERNMENT PRINTING OFFICE: 1966